

Govender (Migration) [2021] AATA 3141 (12 August 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Hazel Govender
CASE NUMBER:	1936231
HOME AFFAIRS REFERENCE(S):	BCC2018/3293025
MEMBER:	Steven Griffiths
DATE:	12 August 2021
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 12 August 2021 at 4:46pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – relationship ceased – genuine and continuing relationship before family violence – parties divorced – no joint financial commitments or ownership of assets – limited involvement with the couple’s children – limited mutual commitment to a shared life – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, r 1.15; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant, Ms. Hazel Govender, applied for the visa on 31 August 2018 on the basis of her relationship with her then sponsor, Mr. John Drummond. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because the delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsor.
4. The applicant was assisted by their registered agent, Ms. Phuong Le, of Catherine House.
5. The applicant appeared before the Tribunal on 6 August 2021 to give evidence, respond to questions and present arguments.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The Tribunal has taken into consideration all the evidence in the Department of Home Affairs file and the Tribunal file.

8. ISSUE

9. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act, of the sponsor.

10. BACKGROUND OF THE EVIDENCE

11. Ms. Govender was born in South Africa in 1969. Her mother is deceased, with her father, born 1949, and 2 brothers and 2 sister, living in South Africa. She was married from 01/1988 to 11/2009 and has 2 children, born 1989 & 1993. She was granted a Visitor 600 Visa on 26/1/18 and to cease 7/9/18 and arrived in Australia on 28/2/18 and departed 26/3/18, returning on 7/6/18. She has been on a WA-010 Bridging Visa from 31/8/18.
12. Mr. Drummond was born in Australia in 1952. No details were provided for his parents. He was married from 01/1974 until his wife died in 24/2/14 and has 4 children.

13. INFORMATION TO THE TRIBUNAL

14. Since the Department made a decision, the parties have provided further information to the Tribunal including:-

15. Review application, 23/12/19

16. Australian Red Cross statement of 19/12/19 in confirmation of support provided to applicant from 14/10/19 and information applicant has outlined to them
17. Catherine House statement of 20/12/19 in confirmation of support provided to applicant from 13/12/19 and information applicant has outlined to them
18. Parties Certificate of Marriage, 26/7/18
19. Applicant bank account, 24/10/19 to 17/12/19
20. Report by Hutt Street Centre, 29/1/20, confirmation of contact by applicant on 15/10/19
21. Statement by Sandra Griffiths, friend of applicant, 26/12/19
22. Report by Mr Nguyen, Housing Support Officer, City of Salisbury, 6/1/20, confirmation of contact by applicant 1/10/19 and assistance provided.
23. Report by Catherine House, 22/1/20, confirmation of support provided to applicant and details of the information provided by the applicant on the spousal relationship and family violence.
24. Applicant Statutory Declaration, 26/8/20 (identical to handwritten version of 7/11/19)
25. 24-7 MEDCARE, Dr. Heather Munro, 3/6/21, treating GP of applicant from 2/1/20
26. Form 1410, Statutory Declaration for Family Violence Claim, 26/8/20
27. Catherine House, request for Priority consideration, 17/5/21
28. Enable College, reference on behalf of applicant, 13/7/21
29. Agent Ms. Phuong Le, Caseworker of Catherine House, submission, 14/7/21
30. **Migration Act, 1958, Section 376 Certificate issued by the Minister**
31. The Tribunal notes the provision by a Delegate to the Minister for Home Affairs of a Section 376 Certificate issued on 3/1/20 being in place.
32. The Tribunal informed the applicant of the Certificate, provided them with a copy, and outlined that the certificate related to two report received in September 2018 on her commitment to the relationship.
33. The Tribunal provided the applicant with the opportunity to have a short break to discuss the certificate with her agent, with the applicant deciding that she wished to proceed.
34. The Tribunal confirmed with the applicant that the issues contained in the two reports from September 2018 had been considered by the Tribunal to not be adverse information, while some details contained would be included in questions put during the hearing.

Whether the parties are in a spouse or de facto relationship

35. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen by birth.
36. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

37. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
38. The Tribunal notes that at the time the visa application was made the parties provided documented evidence of the sponsor marrying the applicant in Australia on 26 July 2018.
39. The Tribunal has regard to the documented and oral evidence and finds that the parties were married to each other at the time of the visa application, with the marriage valid for the purposes of the Act as required by s.5F(2)(a).
40. The Tribunal accepts the oral evidence of the applicant that she and the sponsor were divorced on 26 April 2021, at the instigation of the sponsor.

41. Claim of Family Violence

42. The Tribunal notes the documented evidence of an email dated 26/4/18 from the applicant to the Department of family violence by the sponsor against her.
43. The Tribunal notes a report, dated 22/1/20 from Catherine House of the support provided to the applicant and details of the information provided by the applicant on her spousal relationship and family violence.
44. The Tribunal notes the Form 1410, Statutory Declaration for Family Violence, dated 26/8/20 while being received on 4/6/21, submitted by the applicant.
45. The Tribunal notes a report, dated 3/6/21, by Dr. Heather Munro of 24-7 MedCare and General Practitioner to Catherine House, confirming 6 consultations with the applicant between January and June 2020 with reference to her physical and mental health.
46. The Tribunal notes a report by Hutt St Centre, dated 29/1/20, on meeting with the applicant on 15/10/19 and details of the information given by her on her relationship with her husband.

47. The Tribunal notes this documented evidence of a family violence claim was submitted to the Department prior to a decision being made by the Delegate on the Partner Visa application.
48. The Tribunal notes the Decision Record dated 6 December 2019 details that before assessing the claim of family violence it was a requirement to determine if the applicant and sponsor were in a spousal relationship prior to the cessation of the relationship, with the decision being, based on the assessment of the evidence provided, that the parties had not been in a spousal relationship.
49. The Tribunal confirmed to the applicant at the start of the hearing that the review application was based upon the Delegate decision of 6 December 2019 to refuse the Partner 880 Visa on the basis that a spousal relationship did not exist, and that the Tribunal or any other body can only give consideration to the family violence claim if the spousal relationship is found to have existed prior to the cessation of the relationship.

Are the other requirements for a spouse relationship met?

50. The Tribunal has considered the evidence relevant to the matters in r.1.15A and taken into account the available documentary evidence contained on the Department's file, the Tribunal's file and the oral evidence provided to the previous and current Tribunal.

CLAIMS AND FINDINGS

Financial aspects of the relationship that must be considered include:-

- (i) *any joint ownership of real estate or other major assets; and*
 - (ii) *any joint liabilities; and*
 - (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) *whether one person in the relationship owes any legal obligation in respect of the other; and*
 - (v) *the basis of any sharing of day-to-day household expenses.*
51. The Tribunal accepts the documented and oral evidence of the applicant and determines at the time of the visa application and prior to the relationship ceasing that the parties did not have joint ownership of any real estate or other major assets.
 52. The Tribunal accepts the documented and oral evidence of the applicant and determines that at the time of the visa application and prior to the relationship ceasing the parties did not have any joint liabilities.
 53. The Tribunal accepts the documented and oral evidence of the applicant and determines at the time of the visa application and prior to the relationship ceasing the did not have a legal obligation to the other.
 54. The Tribunal accepts the oral evidence of the applicant that the sponsor told he that he did not wish her contribute to any joint financial arrangements by transferring to Australia any funds she held in South Africa.
 55. The Tribunal accepts the oral evidence of the applicant that the sponsor told her that she was not permitted legally to have a bank account in Australia.
 56. The Tribunal accepts the oral evidence of the applicant that she was given access to a card to use for accessing funds from an existing account, which the deceased wife of the sponsor

was still listed on, while her name was never detailed on the bank account the card was linked to.

57. The Tribunal accepts the oral evidence of the applicant that she used the car linked to the pre-relationship existing bank account rarely, as the sponsor “purchased everything I needed”.
58. The Tribunal accepts the oral evidence of the applicant that the sponsor never provided her with any details of his financial arrangements, providing the example of “the sponsor paid bills electronically after I went to bed so I could not see anything”.
59. The Tribunal accepts the oral evidence of the applicant that she was not aware of the sponsors superannuation details and had no information on if she was a beneficiary.
60. The Tribunal accepts the oral evidence of the applicant that she was not aware of the Last Will & Testament of the sponsor, noting she stated “he kept me at a distance” when asked?
61. The Tribunal determines, upon a review of the documented and oral evidence of the applicant, that at the time of the visa application and prior to the relationship ceasing, that the financial arrangements of the parties does not represent the pooling of financial resources, especially in relation to major financial commitments and places weight on this.
62. The Tribunal accepts the oral evidence of the applicant that the sponsor purchased everything she needed, and provided her with accommodation and food, and funded their social activities, and determines at the time of the visa application and prior to the relationship ceasing, that all day to day household expenses were shared.
63. *Nature of the household aspects that must be considered include:-*
 - (i) *any joint responsibility for the care and support of children; and*
 - (ii) *the living arrangements of the persons; and*
 - (iii) *any sharing of the responsibility for housework*
64. The Tribunal accepts the documented and oral evidence of the applicant that she has 2 sons, born 1989 & 1993, who live in South Africa.
65. The Tribunal accepts the oral evidence of the applicant that the sponsor, who had been with her in South Africa over two visits he made, had not met or spoken to the children of the applicant.
66. The Tribunal accepts the oral evidence of the applicant that the sponsor told her during their relationship and marriage that they would both return to South Africa for holidays in the future and they would spend time with her children then.
67. The Tribunal accepts the oral evidence of the applicant that she was in contact with her children and siblings in South Africa, with no evidence provided that the sponsor ever spoke to family members of the applicant.
68. The Tribunal accepts the documented, photographic and oral evidence of the applicant that the sponsor has 4 adult children, with the sponsor and applicant having good relations with them and taking part in family events with the children and grandchildren.
69. The Tribunal determines that at the time of the visa application and prior to the relationship ceasing, the combined 6 children of the applicant and sponsor were all adults living independent lives and not reliant upon care and support by their parents.

70. The Tribunal accepts the documented and oral evidence of the applicant that from her arrival in Australia, initially on 28/2/18 to 26/3/18 and then from 7/6/18, the applicant lived with friends of the sponsor as it was not appropriate given the parties religious beliefs for them to live together while not married.
71. The Tribunal accepts the documented and oral evidence of the applicant that she and the sponsor lived together from their marriage on 26/7/18, including a period of approximately 4 weeks early in the marriage when they house sat for friends, until 17/9/19 when the sponsor advised that the relationship was ceasing and removed the applicant from the home.
72. The Tribunal accepts the documented and oral evidence of the applicant that one of the daughters of the sponsor and her 2 children lived with them for a few months while they were "in between" houses.
73. The Tribunal accepts the oral evidence of the applicant that as she had not sought a job, as the sponsor had told her that she was not permitted to work until her visa application had been resolved, she committed herself to doing all the household responsibilities, stating "that I wanted to be busy", while no evidence in documented or oral form was provided on any household responsibilities undertaken by the sponsor.
74. The Tribunal determines, at the time of the visa application and prior to the relationship ceasing, that the parties did not share the responsibility for housework.
75. *Social aspects of the relationship that must be considered include:-*
- (i) whether the persons represent themselves to other people as being married to each other; and*
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) any basis on which the persons plan and undertake joint social activities*
76. The Tribunal accepts the documented and oral evidence of the applicant that the sponsor proposed the applicant prior to her departure from Australia on 26/3/18.
77. The Tribunal accepts the documented and oral evidence of the applicant that the sponsor travelled to South Africa in May 2018, with an engagement party held on 3rd June in South Africa with friends of the applicant.
78. The Tribunal accepts the documented, photographic and oral evidence of the applicant of the parties marrying in Australia on 26 July 2018, with a Certificate of Marriage provided.
79. The Tribunal accepts the photographic and oral evidence of the applicant three of the four adult children of the sponsor attended the wedding, with the partners and children also attending.
80. The Tribunal accepts the documented, photographic and oral evidence of the applicant and determines that at the time of the visa application and prior to the relationship ceasing the parties presented to people at all times that they were in a relationship, had then married and were living together.
81. The Tribunal accepts the documented evidence provided by friends of the applicant that the relationship had challenges, due to the sponsor, and senior members of the Baptist Church he attended, requesting the applicant to no longer be involved with the Seventh Day Adventist Church, with the applicant telling friends she had met through the Church of the demands being made by the sponsor and the difficulties this was creating in the relationship.

82. The Tribunal notes the documented evidence of a daughter of the sponsor, provided to the Department on 19/9/19, in which she states “my family and I had many concerns due to her behaviour, mind games, coercion and the steps my father made to prove his love for her” and that the marriage has “broken down due to domestic done by her towards him and my father’s health has declined during the duration of it also”.
83. The Tribunal determines at the time of the visa application and prior to the relationship ceasing that the opinion of family and close friends was that the marriage had issues, with the reasons for and the person responsible for these issues being dependent on which of the parties the person was close to and supportive of, and places weight on this.
84. The Tribunal accepts the documented, photographic and oral evidence of the applicant of the parties being involved in church, family and friend related activities and determines at the time of the visa applicant and prior to the relationship ceasing, that the parties planned and undertook joint social activities.
85. *Nature of the commitment to each other that must be considered include:-*
- (i) the duration of the relationship; and*
 - (ii) the length of time during which the persons have lived together; and*
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) whether the persons see the relationship as a long-term one.*
86. The Tribunal accepts the documented and oral evidence of the applicant that the parties first met in South Africa on 1/10/17, with the sponsor asking the applicant for her contact details when he left South Africa several weeks later, the parties then being in contact and the sponsor inviting and paying for the applicant to visit Australia, which she did for a month from 28/2/18, the sponsor proposing to the applicant before she left Australia, the sponsor then travelling to South Africa, the parties holding an engagement party their and the parties both coming to Australia and marrying on 26/7/18, with the relationship ceasing on 17/9/19 when the sponsor told her the relationship was finished took her from the home and deposited her at a caravan park and had no further contact with her.
87. The Tribunal accepts the documented and oral evidence of the applicant that the parties lived together from their marriage in 26/7/18 to 17/9/19 when the sponsor told the applicant the relationship was finished and removed her from the home.
88. The Tribunal notes the documented evidence of the text messages from the sponsor to the applicant, with these messages being written in a supportive, loving way and conveying support and care for the applicant.
89. The Tribunal accepts the documented and oral evidence of the applicant and determines at the at the time of the visa application and prior to the relationship ceasing, that the parties had done many things expected of a married couple, while concerns about the church activities of the applicant and demands by the sponsor for her to stop attending her church created an underlying tension between the parties, with the applicant committed to and supportive of the sponsor, but the sponsor was not committed to and supportive of the applicant, with this materialising in to a decision by the sponsor, 14 months from their marriage, to cease the relationship and remove the applicant from the home, and places weight on this.
90. The Tribunal accepts the documented and oral evidence of the applicant and determines at the time of the visa applicant and prior to the relationship ceasing that the applicant was committed to a long-term relationship, while the actions of the sponsor highlight that for him

that if he could not convince the applicant to no longer attend her church that he himself was not committed to her long-term, this evidenced by making a decision to cease the relationship, remove the applicant from the home and have no further contact with her after being married less than 14 months.

91. Any other circumstances of the relationship

92. The Tribunal accepts the oral evidence of the applicant that the sponsor did not speak to her children or siblings during the period of the relationship and marriage, and finds that this lack of engagement with her family does not equate to being supportive of her and her family.
93. The Tribunal accepts the documented evidence that the sponsor, on 17/9/19, advised the Department at 10.31am that he was no longer in a relationship with the applicant and wished to withdraw his sponsorship, while he sent the applicant a text message at 6.30pm that he was running a bit late would be home soon.
94. The Tribunal accepts the documented and oral evidence of the applicant that after the sponsor arrived home in the evening of 17/9/19 he then had an evening meal and after that told the applicant the relationship was finished, she had to pack her things and he was removing her from the house, then taking her to an area she was not familiar with and leaving her at a caravan park that he had booked for one night.
95. The Tribunal accepts the oral evidence of the applicant that the sponsor instigated divorce proceedings, having the divorce documents delivered to her at a church she had attended, and that the divorce was finalised in late April 2021.
96. The Tribunal has considered the documented, photographic and oral evidence of the applicant and determines, at the time of the visa application, the parties had a mutual commitment to a shared life together as a married couple to the exclusion of all others.
97. The Tribunal has considered the documented, photographic and oral evidence of the applicant and determines, prior to the relationship ceased, that the applicant was committed to the relationship while the sponsor was not committed to a shared life together as a married couple to the exclusion of all others.
98. The Tribunal considered the documented and oral evidence of the applicant and determines the parties have lived separately and apart on a permanent basis from 17 September 2019.
99. On the basis of the above the Tribunal is not satisfied that the requirements of s 5F(2) are met at the time the visa application was made or prior to the relationship ceasing.
100. Therefore the applicant does not meet cl 820.211(2)(a).
101. The Tribunal notes that the applicant has not sought consideration of the visa on the basis of the alternative criteria of cl.820.211(7), cl.820.211(8) or cl.820.211(9), with the Tribunal considering this and determines the criteria is not met.
102. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

103. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Steven Griffiths
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).